IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 4TH JUNE 2007 / 14TH JYAISHTA 1929

CRL.A.No. 264 of 2007()

SC.48/2004 of ADDL. SESSIONS COURT (ADHOC), TRIVANDRUM

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APPELLANT: APPELLANT

UDAYAKUMAR,C.NO.1162,CENTRAL PRISON,
TRIVANDRUM.

BY ADV. SRI. C.T. JESTIN (STATE BRIEF)

RESPONDENTS: RESPONDENT

STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR,HIGH COURT OF KERALA,ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/06/2007, THE COURT ON 4-6-2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 264 of 2007

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Dated: 04-06-2007

JUDGMENT

In this Appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who was the sole accused in S.C. 48 of 2004 on the file of the Addl. Sessions Judge (Fast Track Court - I), Thiruvananthapuram for offences punishable under Sections 55 (a) and 55(i) of the Abkari Act challenges the conviction entered and the sentence passed against him by the said Court for the aforementioned offences.

2. The case of the prosecution can be summarised as follows:-

On 13-8-2001 at about 12.30 p.m. in Kalluvila Purayidom near Sreekrishna Bhavan where one Mannadikonam Dayanandan and others are residing in Maranalloor village within the limits of Malayankeezhu police station, the accused was found in possession of 4 litres of illicit arrack and found attempting to conduct retail sale of the said arrack using a glass tumbler.

The accused has thereby committed offences punishable under Sections 55 (a) and 55 (i) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for offences punishable under Sections 8(2) and 55(a) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5 witnesses as P.W.s 1 to 5 and got marked 6 documents as Exts. P1 to P6 and 2 material objects as Mos 1 and 2.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the learned Addl. Sessions Judge, did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 2-11-2006 found the appellant guilty of the offences charged against him and sentenced him to rigorous imprisonment for 2 ½ years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine, to undergo rigorous imprisonment for six months more. It is the said judgment which is assailed in this appeal by the accused.

7. I heard Advocate Sri.C.T. Justine the learned counsel who defended the appellant on State Brief and Advocate Sri. K. Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

9. P.Ws 1 and 5 are the independent witnesses examined by the prosecution. Both of them are attestors to Ext.P1 mahazar prepared by the detecting officer. But both of them turned hostile to the prosecution. P.W.2 is the police constable who accompanied the detecting officer. P.W.3 who was the Assistant

Sub Inspector of Malayankeezhu Police Station was the officer who detected the offence while on patrol duty. P.W.4 is the Sub Inspector of Malayankeezhu Police Station who verified the investigation conducted by P.W.3 and laid the charge before court.

10. After hearing both sides and after perusing the oral and documentary evidence in the case, I am not satisfied that the prosecution has succeeded in bringing home the guilt of the accused beyond reasonable doubt. Eventhough P.Ws 1 and 5 who are the independent witnesses turned hostile to the prosecution, the testimony of P.Ws 2 and 3 is sufficient to hold that the accused was found in possession of MO1 jerry can having 5 litres capacity and containing about 4 litres of some liquid which was believed to be illicit arrack. But the further question is as to whether Ext.P6 certificate of chemical analysis which shows that the sample forwarded to the chemical examiner contained 40.99 percent by volume of Ethyl Alcohol pertains to the contents of the jerry can allegedly carried by the accused. Going by Ext.P1 contemporaneous seizure mahazar prepared by P.W.3 from the spot itself the jerry can which allegedly

contained the contraband liquor was seized by P.W.3 under Ext.P1 mahazar after sealing the same. P.W.3 claims to have produced the property before the Magistrate on the very same day, that is, on 13-8-2001 itself. Ext. P4 is the property list evidencing the production of the properties allegedly seized in this case. As per the said list the 5 litre can containing 4 litres of the contraband liquor is not described as a sealed can. There is an endorsement on Ext.P4 property list by the Magistrate on 13-8-2001 itself directing the Station House Officer, Malayinkeezhu to keep the thondi items in his custody until further orders. According to the learned Public Prosecutor, since Ext.P5 forwarding note has also been submitted before court on 13-8-2001 itself it must be presumed that what has been directed to be returned to the Station House Officer is only the contraband liquor which remains after drawing a sample of 180 ml. therefrom. It is true that Ext.P5 forwarding note has been submitted by P.W.3 the detecting officer on 13-8-2001 itself. Admittedly he had not drawn any sample of the contraband liquor from the spot. On the date of filing of Ext.P5 forwarding note also there was no sample before court. But against column 4 and 5 of Ext.P5 what is

written is that a sealed bottle containing 180 ml. was seized in Crime No. 74 of 2001 and the same is requested to be forwarded to the chemical examiner for analysis. It is not known as to how such a description of a sealed bottle finds a place in Ext.P5. There is no endorsement either on Ext.P4 property list or on Ext.P5 forwarding note by the Magistrate directing the thondi section clerk in-charge of the properties to draw a sample from the can containing the alleged contraband liquor produced in this case. There is nothing on record to show that any sample was drawn from the office of the Magistrate, much less, any direction by the Magistrate to take a sample. There is, therefore, nothing to show that a sample was drawn either by the detecting officer or by the Magistrate from the can which was produced in this case along with Ext.P4 property list. Even if it were to be assumed that a sample was taken on 13-8-2001 by the thondi section clerk of the Magistrate concerned , there is no contemporaneous record to that effect. The thondi section clerk in-charge of the properties was also not examined as a witness. If, in the absence of any of the aforementioned documents, this court were to assume that a sample was in fact taken on 13-8-

2001, there is no material to show that it was the said sample which was eventually forwarded to the chemical examiner. Ext.P6 certificate of chemical analysis refers to a letter dated 15-12-2001 from the Magistrate while forwarding the sample bottle for analysis. If a sample was drawn on 13-8-2001, there is absolutely no explanation as to why it was forwarded to the chemical examiner only on 15-12-2001. When the can which was produced in court was not a sealed can (as against Ext.P1 mahazar in which it is conspicuously described as a sealed can) an explanation is due from the prosecution as to whether it was the very same can which was sealed and seized under Ext.P1 mahazar that was produced before court as item No. I in Ext.P4 property list. It is only on proof of the above fact that the prosecution will be justified in contending that the sample which was finally analysed by the chemical examiner was one drawn from the liquid contained in the can possessed by the appellant. It cannot be gainsaid that a sample before it finally reaches the hands of the chemical examiner passes through several hands. The prosecution will be able to establish the guilt of the accused only if it is proved that a sample drawn from the contents of the

can carried by the accused was despatched to the chemical examiner in a tamper proof condition and the same on analysis was found to contain illicit arrack.. (Vide The State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala v. State of Kerala - 1993 (2) KLT 550).

11. The conviction entered by the learned Addl. Sessions Judge overlooking the above vital aspect cannot therefore, be sustained and is accordingly, dislodged.

12. The appellant is found not guilty of the offences punishable under Secs. 8 (2) and 55(a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case against him.

In the result, this Criminal Appeal is allowed as above.

V. RAMKUMAR
(JUDGE)

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V. RAMKUMAR, J.

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Crl. Appeal No. 264 of 2007

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Dated, this the 4-6-2007

JUDGMENT